No. 22,464

IN THE

United States Court of Appeals

For the Ninth Circuit

ELECTROMEC DESIGN AND DEVELOPMENT CO., INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON PETITION FOR REVIEW AND CROSS-PETITION TO ENFORCE A DECISION AND ORDER OF THE NATIONAL LABOR RELATIONS BOARD

PETITIONER'S REPLY BRIEF

COTTRELL, HOFVENDAHL, & ROESSLER,
By RUSSELL L. HOFVENDAHL,
210 North Fourth Street,
San Jose, California 95112.
Telephone: (408) 295-1385.
Attorneys for Petitioner.

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INTRODUCTION.

Pursuant to Rule 18 (4) of the Rules of this Court, Petitioner replies to Respondent's brief filed herein.

Petitioner presented seven questions and nine specifications of error in its opening brief. Respondent's brief refers only to the "Questions Presented."

However, the concluding section of Respondent's brief does separately state and argue the procedural due process issue. Additionally, by footnote reference or otherwise by unsegregated argument some of Petitioner's questions presented in its opening brief are referred to in Respondent's brief. Accordingly, this reply brief will be addressed to the arguments contained in Respondent's brief in essentially the same order as they are presented therein.

For convenient reference Petitioner will use its own topical headings to separate and describe the particular points answered in order as they are met in the body of Respondent's argument.

RESPONDENT'S COUNTERSTATEMENT OF THE CASE.

I.

In general, counsel's statement of the facts appears to be more accurate than the Board's decision (Petitioner's Opening Brief, pages 44-46).

However, there is no reference in Respondent's counterstatement to the fact that Bates, who was one of the men instigating the union election, walked off the job on October 8, 1966, was not discharged, and is still employed at Electromec.

There is no reference to the fact found by the Trial Examiner (R. p. 22, line 60) that "management was unaware of any turmoil" (after September 21, 1966, and before October 8, 1966).

Petitioner has stated the facts in its opening brief, Respondent has counterstated the facts in its brief. Both sides have emphasized what is deemed important to the respective positions.

Petitioner will not restate the factual issues further since the basic facts are not in dispute.

II.

The Board's reversal of the Trial Examiner in finding that the concerted activity "concerned terms and conditions of employment" and that it was protected activity is, of course, vigorously excepted to by Petitioner, since the discharged employees neither before, during, or after the walkout gave management their reasons for their actions.

RESPONDENT'S ARGUMENT.

1. Saxer's voluntary termination.

At page 12, footnote 6, of Respondent's brief a one-paragraph reference is made to the fact that Saxer's voluntary termination is of no significance to the case. At pages 37 and 38 of the opening brief Electromec stated its understanding of its rights vis-a-vis the acceptance of Saxer's notice of termination. As stated therein, no authorities have been found by Petitioner on this point and since none were cited by Respondent it would appear that this is a point of original impression. Electromec will submit this issue on the argument made in its opening brief.

2. Saxer, Gilbert, Mooney and Pickelman were not legally a part of the concerted activity.

In a continuation of footnote 6, at page 12 of Respondent's brief, the fact that the dischargees had permission to leave early is dismissed as "completely without merit."

Petitioner disagrees emphatically. A substantial portion of the opening brief (pages 22-28) was devoted to this issue.

The Trial Examiner did not agree with Electromec's argument in this connection, the Board simply attached "no significance" to his finding in that connection, and now counsel for the Board dismiss the argument summarily as completely without merit.

It is submitted that this Court will consider this issue as being completely meritorious.

Electromec finds it difficult to conceive of a factual situation, postulated in general terms in footnote 6, page 12 of Respondent's brief, wherein an employer could deprive his employees of the right to engage in protected activities "simply by sanctioning such activities." Be that as it may, the facts here are clear and uncontradicted.

Disregarding for the moment all of the legal analysis addressed to this issue, the Trial Examiner found the facts rather succinctly in his decision (R. p. 30, lines 43-45):

> "Presumably expecting that they might be suspected of leading a walkout, each of the four dischargees sought permission to leave early."

For all of the reasons stated in the opening brief (pages 22-28) Electromec again reiterates its emphatic contention that these four men cannot have it both ways. Legally they were not part of this concerted action.

3. There was no factual connection between the September 21st meeting and the October 8th walkout.

The last sentence on page 13 of Respondent's brief and the first sentence on page 14 read as follows:

> "After listening to these proposals, Padgett promised some improvements in hospitalization benefits, but otherwise merely explained to the employees

> why the Company was unable to grant their requests. These demands were still pending and unsatisfied when less than three weeks later — on October 8 — the employees walked out."

Padgett may have been right or he may have been wrong in his handling of the five issues. The point is that there was no turmoil or unrest apparent to management after the September 21st meeting and prior to the October 8th walkout. The first sentence quoted above demonstrates that as far as management was concerned the meeting was a closed issue and, other than the improved hospitalization which was indeed forthcoming, there simply were no pending demands.

Respondent cites *N.L.R.B. vs. Washington Aluminum Co.*, 370 U.S. 9, 14 as authority for this distortion of the record to connect the September 21st meeting with the October 8th walkout. In that case the men walked out on a bitterly cold day, practically at the invitation of a foreman, to protest the failure of the company to provide sufficient heat in the plant. Obviously, there could be no doubt in anyone's mind in that factual situation as to what caused the walkout. Despite the broad language used by the Supreme Court in *N.L.R.B. vs. Washington Aluminum Co.* there simply is no application of the facts of that case to the instant case.

When the employees, as here, do not before, during, or after the walkout ever tell Electromec the purpose of the walkout then, it is submitted, the holding of *N.L.R.B. vs. Ford Radio & Mica Corporation*, 285 F.2d 457 (1958) at page 465 squarely controls this issue, wherein the Court states:

"However, where the employer from the facts in its possession could reasonably infer that the employees in question are engaging in unprotected activity, justice and equity require that the employees, if they chose (sic) to remain silent, bear the risk of being discharged."

4. The employees never communicated a purpose for the walkout to Electromec.

Respondent's brief states at page 15, "The Company's contention that when it discharged these employees, it had no knowledge that they had engaged in a protected walkout is unavailing."

This statement may be at the least puzzling for this Court since no such contention was made in Petitioner's opening brief.

Inasmuch as the Trial Examiner made reference to this point (R. p. 28, lines 13-21), as did the Board in its decision (R. p. 150, lines 18-19), Electromec will utilize this opportunity to clarify the record.

In its written argument to the Trial Examiner Electromec did indeed include a short argument under this approximate topical heading now described by Respondent as a "contention" of Electromec. Since the written arguments to the Trial Examiner were not made a part of this record on appeal, that particular part of the argument is set out here, including its topical heading, verbatim and in its entirety.

"ELECTROMEC DID NOT KNOW THAT THE EMPLOYEES WERE ENGAGED IN A PROTECTED ACTIVITY.

In his dissent in *American Art Clay* Judge Kiley states at page 92:

> 'The remaining issue is whether the discharge was not an unfair labor practice because the petitioner did not know and had no means of knowing that the employees were engaged in a protected activity; and that, in fact, petitioner in good faith believed that they had walked out because of the change in foreman. For this contention petitioner relies principally on *N.L.R.B. v. Ford Radio & Mica Corp.*, 258 F.2d 457 (2d Cir. 1958).'

He then went on to state that the assistant plant superintendent knew or should have known that this was a protected activity, and the employer could not evade the act by a division of corporate functions.

This part of the dissent, incidentally, was not written in disagreement with a particular portion of the majority view. It was a statement of the law relative to Judge Kiley's opinion that this particular walkout was a protected activity.

The evidence is absolute and uncontradicted that Electromec was not informed before the walkout. On Sunday, October 9, 1966, Mr. Vasta and two personnel officers spent a substantial portion of the day on the telephone attempting to learn, without success, why the walkout occurred. Finally, on Monday morning Electromec still did not receive an explanation. Perhaps, as Mr. Gilbert testified (Rep. Tr. p. 75, lines 20-25; p. 76, lines 1-5), everything was over and done with in two hours and twenty-one minutes, and the men simply did not have time to explain.

Clearly, this case can be decided on this issue alone. The law, logic, and common consideration require that the least these men are required to do is to inform the employer as to why they are walking off the job."

Obviously, the particular language used for this topical heading in the original argument to the Trial Examiner leaves something to be desired. An adaption of the language from *N.L.R.B. vs. Ford Radio & Mica Corporation* would have been more precise, e.g., "JUSTICE AND EQUITY REQUIRE THE EMPLOYEES TO BRING HOME TO THE EMPLOYER THE PURPOSE OF THE CONCERTED ACTIVITY OR BEAR THE RISK OF BEING DISCHARGED."

It may also be said, at that relatively early stage of the proceedings, the point was raised rather indirectly by Electromec in citing *American Art Clay Company, Inc. vs. N.L.R.B.* 328 F.2d 88 in which the dissenting Judge makes only a passing reference to *N.L.R.B. vs. Ford Radio & Mica Corporation* rather than to have cited the latter case directly. However, it is perfectly apparent from a reading of this extract from the written argument that Electromec was making the particular point that the employees had the duty to inform the employer as to the purpose of the walkout. Whether or not the Trial Examiner dismissed this particular argument in terms of its topical heading he did state, just prior to the quotation from *N.L.R.B. vs. Ford Radio & Mica Corporation* in his decision (R. p. 29, lines 40-41) as follows:

> "In fact there was mostly silence. All appeared inclined not to reveal any reason for the walkout."

Obviously, the Trial Examiner agreed with Petitioner on this issue.

At page 39 of the opening brief Petitioner acknowledged the holding of *N.L.R.B. vs. Burnup & Sims* 379 U.S. 21, that the employer's motivation is immaterial. Clearly, without the contention being made to this Court in the manner stated at page 15 of Respondent's brief it is something less than fair to Petitioner to raise the issue in this form now.

5. The Board did not draw contrary inferences of fact; it overruled the Trial Examiner's conclusion.

Electromec does not take issue with the decisions cited on page 16 of Respondent's brief permitting the Board to draw contrary inferences from the facts found. It will, however, refer to page 21 of the opening brief which discussed the weight due to the findings of the Trial Examiner. Again recognizing the complex and interrelated factual issues here, it is emphatically urged that the Board did not merely draw a contrary inference — it simply disregarded the findings of the Trial Examiner.

It is absolutely clear from the Trial Examiner's decision that the facts he found were that as the men punched out "All appeared inclined not to reveal any reason for the walkout" (R. p. 29, lines 40-41). That during the telephone contacts after the walkout ". . . not one employee gave Respondent the denial of a wage increase to Saxer as a reason for the walkout" (R. p. 29, lines 23-24) and, as to Saxer, "Saxer's professed claim to ignorance of the reason of the others in walking out suggests an intentional deceit supporting an

inference of malice" (R. p. 30, lines 22-24). Concerning the meeting in Padgett's office on October 10, 1966, the Trial Examiner devoted a substantial portion of his decision (R. p. 26, lines 15-58) to an analysis of the evidence, recognizing that the employees stated that they were not asked the reason for the walkout, whereas Padgett stated that they were. The point is that at no time, at this late date, did anyone in fact inform the employer of the purpose of the walkout.

This, of course, brings the issue squarely back to *N.L.R.B. vs. Ford Radio & Mica Corporation.* These employees chose to remain silent. The facts concerning their silence were as found by the Trial Examiner and there are no inferences, contrary or otherwise, to be drawn from these facts as to a stated purpose for the walkout.

Based on these facts the Trial Examiner, citing, *Joanna Cotton Mills vs. N.L.R.B.* 176 F.2d 749 and *N.L.R.B. vs. Ford Radio & Mica Corporation,* concluded that there was no protected purpose for the walkout. The Board did not draw a different inference of fact; it summarily over-turned the conclusion of its own Trial Examiner based on the specific facts he found.

6. The walkout, without a stated purpose, was not protected concerted activity.

Petitioner at page 36 of the opening brief (and of course raising the same point throughout the preceding section of the opening brief commencing at page 29)

quoted from a Supreme Court decision which held that a total strike was a protected activity, slowdowns and walkouts were not.

Electromec recognizes an apparent conflict in the law here. It would seem reasonable to believe that if the employees had brought home to management their particular protected purpose in walking out, as was the inescapable fact in *N.L.R.B. vs. Washington Aluminum Co.*, or had they in fact struck by walking off the job and staying off, then presumably either course of conduct would have constituted protected concerted activity. However, when they communicate no purpose for the walkout to management, and when they obviously disrupt production on a Saturday and return to work on Monday, without ever stating their purpose then, as the Trial Examiner held, this, "is certainly not the type of activity that deserves the protection of the Act." (R. p. 30, lines 10-11).

7. Denial of discovery to petitioner.

In addressing this reply brief to this important issue Electromec does so in the context of the following points:

a. The cases cited by Respondent all hold what they are represented to hold in Respondent's brief. Petitioner will not impose on this Court's time with a case by case analysis demonstrating factual distinctions.

b. The pending case is perhaps no more important to Electromec than were all of the prior cases impor-

tant to those employers denied the right of discovery. Certainly it is no less important.

c. Counsel for Petitioner herein does not consider that this issue is raised now any more eloquently or persuasively than it was undoubtedly raised by numerous counsel for employers in the past.

d. There are no special facts or circumstances in this case that make discovery more important to Electromec than it was to the prior employers denied their rights. Again, it is certainly not less important.

e. The nature of the preliminary investigation by the Board, and the interrogation of witnesses by the Board without benefit of counsel, make the availability of discovery to the employer of far greater importance in a proceeding of this nature than it is in general litigation where the denial of discovery to a litigant is legally and equitably inconceivable.

f. The Federal Judiciary has been the leader in developing a simple, efficient and just procedure for discovery, followed now by a large number of state jurisdictions. Considering the elemental requirements of justice, on the one hand, and the practical considerations of attempting to reduce the volume of Board decisions that come before this Court, on the other hand, it is time now to direct the Board to comply with its own rules.

In the opening brief Electromec cited only *N.L.R.B. vs. Globe Wireless Ltd.*, 193 F.2d 748 (1951) on this issue for the specifically stated reason for denying discovery, because there is "no provision in the Act authorizing the use of the discovery procedure."

Electromec assumed that the reference to the "Act" in the above case referred to the original Act and all of the rules and regulations of the Board adopted pursuant thereto (as distinguished from the decisions of the Board in adjudicating particular cases). If this assumption is correct then, of course, the depositions should have been permitted since the Board's own rules make specific provision therefor.

In a case cited by Respondent, *N.L.R.B. vs. Safway Steel Scaffolds Company of Georgia*, 383 F.2d 273 (1967), Judge Thornberry, for the Fifth Circuit, addressed himself to this precise point, at page 176, as follows:

> "Section 10(b) of the Act would appear to give a trial examiner authority to permit the taking of depositions in any case where such a procedure would be practical:
>
> > Any such (unfair labor practice) proceeding shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States, * * * 5
>
> However, the practicality of having pretrial discovery in labor proceedings has been somewhat uncertain. In 1960, Member Jenkins submitted a committee's proposals for changes in the Board's rules and regulations. 45 L.R.R.M. 94, 101 (1960). Among other things, he noted that it would be desirable to have pretrial discovery but that it would not be feasible for trial examiners to preside over the taking of all depositions. He went on to say that there was no reason why the inability of examiners to preside should be an insuperable obstacle:

> Personally, I can see no reason by such depositions could not be taken by either party as a matter of right before anyone authorized by the state or Federal government to take oaths, if some means could be devised for enforcing this right without having to resort to the tedious and time-consuming process of obtaining a court order to enforce the right of deposition.
>
> The Board was persuaded by this comment and evidently did not visualize any real problem of enforcement; for its rules and regulations now provide a detailed procedure for the taking of depositions if in the judgment of the trial examiner good cause has been shown. NLRB: Statements of Procedure, Rules and Regulations §§ 102.30, 102.35 (Lab. Rel. Rep. LRX 4058, 4060). In light of section 10(b) and of these new rules, which were in effect when the hearing in the instant case was conducted, we must conclude that the examiner was wrong in holding that there is absolutely no provision for pretrial discovery.
>
> 5. Fed.R.Civ.P. 26-37 govern pretrial discovery in civil cases to be tried in federal district courts. Rules 26-32 set out detailed procedures for taking depositions upon oral examination and written interrogatories."

Obviously, Judge Thornberry's careful description of the chronology, commencing with a committee recommendation in 1960, demonstrates that he reached the same conclusion that Petitioner did, as set out in Petitioner's Opening Brief, pages 13-15.

N.L.R.B. vs. Safway Steel Scaffolds Company of Georgia illustrates the practical trial difficulties facing the employer who is denied the right of discovery. In commenting on the evidence at page 280, the Court stated:

> "Second, it offered evidence which tended to show that Mr. Wallace could not have made the statements he allegedly made to Frank Edward Cogdel on two separate occasions in June because he was not at the plant on either of those days. The making of the statements to all employees in May and to Quincy Knox in July was denied but not effectively refuted. Although this rebuttal evidence might have led us to a different result had we been the original triers of fact, we cannot, under the substantial-evidence rule, say that the Board, following the examiner, was unreasonable in believing the employees or that its findings were not based upon such relevant evidence as a reasonable mind might except.
>
> (12-14) Any uneasiness we might have about the credibility of Frank Edward Cogdel, the General Counsel's principal witness, is overcome by the fact that respondent clearly violated section 8(a) (5) when it reduced wages on July 1."

With this particular case following the normal course of an unfair labor practice hearing it is clear that counsel for the employer learned at the hearing for the first time of the statements allegedly made by Mr. Wallace. It seems to Petitioner that trial counsel must have, under pressure, accomplished an outstanding job of presenting rebuttal evidence for the Court to hold ". . . this rebuttal evidence might have led us to a different result had we been the original triers of fact . . ."

Assuming this case had gone to hearing without the objective fact of the employer's having reduced wages on July 1, the entire thrust of the unfair labor practice charge could have depended on whether or not Mr. Wallace made the statements attributed to him. Given that assumption, and given the pre-trial discovery

which is considered an elementary and basic right in all litigation, it would appear from a reading of the opinion that employer's counsel could have so effectively presented the rebuttal evidence that there would have been no doubt in the Trial Examiner's mind. It would appear to be a reasonable assumption that this case could have ended at that level, and not have constituted one more N.L.R.B. case before a United States Court of Appeals.

Given the discovery which is normally considered such a basic element of justice, it is at least reasonable to assume that many employers might, through the medium of that discovery, learn that their own managerial personnel for whose acts and statements they are accountable have indeed been guilty of an unfair labor practice. With a reasonable period before trial to evaluate the available evidence many employers might very well elect to make their peace with the Board rather than to proceed to hearing.

Electromec finds itself in the somewhat anomalous position of having been denied its right to discovery and yet having prevailed before the Trial Examiner.

If an employer who has lost before the Trial Examiner does not prevail before the Court of Appeals because of lack of a showing of prejudice how, it may well be asked, can this employer, winning its case before the Trial Examiner, claim prejudice? The answer, of course, is that the employer goes before the Board on review of a Trial Examiner's decision with an imperfect, and incomplete, record. The employer is now bound by it and because of a denial of its right to pre-

trial discovery, and a denial of its right to effectively prepare the case for trial, that record does not adequately reflect the employer's position.

Living on the side of the angels, with all of the administrative and investigative machinery of the Board available, it is a simple matter for Respondent's counsel now to say that Electromec "could as easily" have presented this evidence. The fact is that when counsel is learning for the first time in the course of trial what the specific allegations are he simply does not have the time available to effectively present the rebuttal evidence.

Another case cited by Respondent illustrates the problem faced by the employer. *Texas Industries Inc. vs. N.L.R.B.*, 336 F.2d 128 is cited for the proposition that Electromec "could have interviewed the employees." Also, it is pointed out at page 19 of Respondent's brief, that in fact the "Company did interview employees who had participated in the walkout." *Texas Industries Inc. vs. N.L.R.B.*, at page 133, says specifically, in referring to the right to interview employees, that 'The privilege, however, is a narrow one."

At the time of the walkout, and immediately following it, Electromec did indeed interview its employees. There was no pending litigation then and this employer was making a sensible effort (without success, it may be noted) to learn just what had occured.

Interviewing employees, then, is a vastly different thing from interviewing them in the context of a pending unfair labor charge complaint. The employer

is already enmeshed and it would be something less than prudent, without having any knowledge of what the complaining witnesses contend, to embark on a blanket interrogation of the non-complaining employees, and perhaps risk additional charges by that very act.

As a matter of trial preparation it is a cart before the horse situation anyway. The employer cannot know what investigation and marshalling of the available evidence is required until, of course, he knows precisely what the contentions of the adverse parties are. These contentions are, of course, discovered and established by deposing an adverse party under oath.

As was pointed out in the opening brief (pages 14-15) there are a number of highly specific and relevant matters to which Electromec could have addressed its trial preparation had it been given the basic right of deposition discovery.

Certainly the fact of no stated purpose before, during or after the walkout could have been more effectively presented with additional evidence.

Electromec could have established that the other employees did not know that Saxer, Gilbert, Mooney and Pickelman had attempted to protect themselves by obtaining permission to leave early.

It is believed that Electromec could have established to a certainty as Porchein testified (opening brief page 18), and as the Trial Examiner apparently concluded, that the only purpose of the walkout was to retaliate against Porschein—an unprotected purpose.

Clearly, Electromec could have proved that the men who walked out knew that Saxer had already tendered his resignation.

Electromec would certainly have established that there was absolutely no connection between the September 21st meeting and the October 8th walkout.

Obviously, some of this evidence came in anyway, by cross-examination of the dischargees. The point is, however, that when counsel is compelled to try the case blind, the record is incomplete, one side is deprived of a complete and fair trial, and the record is left in a condition which permits the Board to rationalize at will in order to reverse its Trial Examiner.

In the introductory notes to Rule 26 of the Federal Rules of Civil Procedure at 28 U.S.C.A. Rules 17 to 33 292, an extract from a law review article states the case on this issue as fully and fairly as it can be made:

> "The rules, both by virute of their express provisions and as a result of the liberal and enlightened manner in which they have been construed and applied by the courts, afford simple and efficacious means for a searching discovery, narrowing of the issues and obtaining evidence for use at the trial. They have proven a marked and noteworthy advance in the administration of justice. A number of states have adapted the federal practice in this respect for the use in the local courts. The discovery remedies embody a far-reaching step in the direction of achieving the principal goal of the new procedure, to which reference was made at the opening of this discussion, namely, the elimination of the 'sporting theory' of justice." 1942, 41 Mich. L. Rev. 224.

It is submitted that the writer considered the former practice at least sporting in that both sides went into trial blind. It would be something of an understatement to suggest that this author might be astonished to learn that the Board not only considers it proper, but entirely appropriate, for one side to proceed to trial fully informed and the other side to go to trial without benefit of discovery.

CONCLUSION.

Respondent apparently does not take issue with the review of the labor relations at Electromec (opening brief pages 39-43) since no reference to these facts is found in Respondent's brief. As stated therein, this was an aspect of the case that should have been given some weight by the Board.

For the reasons set out in the opening brief and this reply brief, the Decision and Order of the National Labor Relations Board should be reversed and vacated, and its Cross-Petition for Enforcement denied.

Respectfully submitted,

COTTRELL, HOFVENDAHL, & ROESSLER,

By RUSSELL L. HOFVENDAHL,

Attorneys for Petitioner.

Certificate of Attorney

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. L. Hofvendahl